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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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DEANA WILLIAMSON
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No._____

In the
Court of Criminal Appeals

FILED
COURT OF CRIMINAL APPEALS
10/5/2017
DEANA WILLIAMSON, CLERK

———♦———

No. 01-16-00179-CR
In the Court of Appeals for the First District of Texas at Houston

———♦———

No. 1445251
In the 351st District Court of Harris County, Texas

———♦———

CYNTHIA KAYE WOOD
Appellant
V.
THE STATE OF TEXAS
Appellee

———♦———

STATE'S PETITION FOR DISCRETIONARY REVIEW

———♦———

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ORAL ARGUMENT NOT REQUESTED

IDENTITY OF JUDGE, PARTIES, AND COUNSEL

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Thomas Lewis — Counsel at trial

Trial Judge:

Hon. Mark Kent Ellis — Presiding Judge

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. P. 68.4 (c), the State does not believe that oral argument is necessary because this case involves a simple application of this Court's precedent. Nevertheless, the State would be happy to present argument if this Court desires it.

TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

STATEMENT OF THE CASE

The appellant was charged with the felony offense of criminal attempt based on the capital murder of an infant (CR – 32). She entered a plea of guilty to the offense without an agreed recommendation from the State as to punishment (CR – 47-48). After the trial court found the appellant guilty of the charged offense, he assessed the appellant's punishment at life in prison (CR – 70) (RR I – 50).

STATEMENT OF PROCEDURAL HISTORY

The lower court of appeals reversed the conviction, finding that capital murder was essentially "aggravated murder" and therefore the State was required to allege the constituent elements of the underlying murder. *Wood v. State*, 01-16-00179-CR, 2017 WL 3261373, at *6 (Tex. App.—Houston [1st Dist.] Aug. 1, 2017, no pet. h.) (attached as Appendix A). The State filed a motion for rehearing, and the court of appeals issued a similar opinion again reversing the conviction. *Wood v. State*, 01-16-00179-CR, 2017 WL 4127835, at *5 (Tex. App.—Houston [1st Dist.] Sept. 19, 2017, pet. filed) (attached as Appendix B). This petition for discretionary review is timely if filed on or before October 19, 2015. TEX. R. APP. P. 68.2.

STATEMENT OF FACTS

The appellant gave premature birth to a baby boy named K.W. on May 10, 2014, and the baby spent the first three months of his life in the hospital (R.R. I – 6-7) (CR – 6-7). Just two days after being released to go home, K.W. was returned to the hospital because he had stopped breathing, and he remained at the hospital for another five days (R.R. I – 8). On September 19, 2014, K.W. was once again returned to the hospital because of a vomiting issue, and he was forced to undergo surgery (R.R. I – 8-9). On September 30, 2014, K.W. was readmitted to the hospital—this time to the intensive care unit—because the appellant claimed that he was not breathing and did not have a pulse (R.R. I – 9-10).

The medical personnel conducted several tests to determine the cause of K.W.'s condition, but the results did not point to one (R.R. I – 10-11). The staff became concerned that the appellant was the cause (R.R. I – 11). They noticed that she did not seem to be very interested in taking care of K.W. (R.R. I – 12). The baby's repeated hospitalizations appeared to be out of proportion to his healthy appearance (R.R. I – 12). The appellant asked that a gastrostomy tube (G-tube) be placed on K.W.'s body, so that he would get food directly to his stomach (R.R. I – 13). But there was no medical reason for a G-tube (R.R. I – 13).

K.W. was moved out of the intensive care unit of the hospital to an intermediate care unit in the same hospital; for the first two days in that new unit—

October 8 and 9— K.W. was doing very well (R.R. I – 14). The appellant was not there during this time, but K.W.'s grandmother was with him (R.R. I – 14).

The appellant returned to K.W. on October 10, and he had another lack-of-breathing episode (R.R. I – 14). The two were alone in the room when this episode occurred (R.R. I – 14-15). K.W. was resuscitated and moved back to the intensive care unit before being placed in a different room in the intermediate care unit shortly thereafter (R.R. I – 15-16). The new room had a hidden camera so that the medical professionals could watch the appellant and K.W. (R.R. I – 16).

On October 11, 2014, the appellant placed an oxygen bag over K.W.'s face as if to give him oxygen, but the bag was not hooked up to oxygen at the time (R.R. I – 16). The next day, the appellant suffocated K.W. on two separate occasions; the video recording captured K.W. kicking his legs as he was being suffocated (R.R. I – 17-20). The appellant pulled a blanket up over K.W.'s face, and his oxygen monitors went off shortly thereafter (R.R. I – 20-21). She also put her hand over his face, and the monitors went off again (R.R. I – 22). After the second occasion, the medical professionals were forced to perform CPR on K.W., and he was again transferred to the intensive care unit (R.R. I – 22-23). K.W. could have suffered permanent brain damage as a result of the appellant's actions (R.R. I – 23).

K.W. did very well after being separated from his mother, and when he went to a foster home, he continued to do well (R.R. I – 23). He has had some

developmental delays that could have been a result of the appellant's mistreatment of him (R.R. I – 24-25). The appellant's mother testified that K.W.'s sister died after repeated hospitalizations (R.R. I – 31). The sister was less than two years old (St. Ex. 4). The appellant claimed that the sister's death was the result of epilepsy and brain malformations, but the death certificate showed that the cause of death was "sudden" and "unexplained" (R.R. I – 31-32) (St. Ex. 4).

GROUND FOR REVIEW

The lower court erred in holding that an indictment for criminal attempt is fundamentally defective when it does not allege the constituent elements of the underlying offense attempted.

ARGUMENT

This petition for discretionary review should be granted because the court of appeals decided an important question of state law in a way that conflicts with the applicable decisions of this Court and because the analysis used by the court of appeals has so far departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision. TEX. R. APP. P. 66.3. Specifically, the court of appeals held that a purported indictment for attempted capital murder is merely an indictment for attempted murder when the State neglects to allege an "aggravating factor" that transforms murder into capital

murder. *Wood*, 2017 WL 4127835, at *5. But this Court has repeatedly held that an indictment for criminal attempt is not fundamentally defective for failure to allege the constituent elements of the offense attempted. *Whitlow v. State*, 609 S.W.2d 808 (Tex. Crim. App. 1980); *Jones v. State*, 576 S.W.2d 393 (Tex. Crim. App. 1979). Furthermore, "aggravated murder" is not an offense in Texas. Therefore, this Court should grant the State's motion for rehearing and affirm the conviction.

The appellant's indictment was titled: "ATTEMPTED CAPITAL MURDER." (CR – 32). The specific allegations were that she "unlawfully, intentionally, with the specific intent to commit the offense of CAPITAL MURDER of K.W., hereafter styled the Complainant, do an act, to-wit: USE HER HAND TO IMPEDE THE COMPLAINANTS ABILITY TO BREATHE, which amounted to more than mere preparation that tended to but failed to effect the commission of the offense intended." (CR – 32) (emphasis in original). The appellant confessed to those exact allegations (CR – 48-49). Finally, her plea admonishments informed her that she was pleading guilty to "attempted capital murder," with the range of punishment of a first-degree felony (CR – 50).

An indictment for criminal attempt is not fundamentally defective for failure to allege the constituent elements of the offense attempted, and "aggravated murder" is not an offense in Texas.

In *Whitlow*, the indictment alleged that the appellant "unlawfully with the specific attempt [sic] to commit the offense of escape, did then and there attempt to escape from the custody of the Falls County Sheriff by the use of a deadly weapon to-wit: a metal club, said attempt amounting to more than mere preparation that tends but fails to effect the commission of the offense intended,…" *Whitlow*, 609 S.W.2d at 809. The appellant claimed on appeal that the indictment was fundamentally defective for failing to include each of the elements of the offense of escape. *Id.* This Court analogized to attempted burglary cases where the elements of burglary do not have to be alleged in the indictment. *Id.* This Court held that the indictment was correct because it alleged that the appellant attempted to commit the offense of escape with the additional allegation that it was done with a deadly weapon. *Id.*

Similarly, the indictment in *Jones* alleged that the appellant "did then and there, with the specific intent to commit the offense of murder, attempt to cause the death of WAYNE BROWN, an individual, by knowingly and intentionally shooting the said WAYNE BROWN with a firearm." *Id.*, 576 S.W.2d at 394-395. The appellant filed a motion to quash, claiming that the indictment failed to allege all of the elements of murder, and he appealed the denial of that motion. *Id.* This Court began by summarizing the case law that "the constituent elements of the particular

theft or intended theft need not be alleged in an indictment or information for burglary with intent to commit theft." *Id.*, 576 S.W.2d at 395. It held that an "attempt offense is analogous to robbery in that the offense attempted need not be proved as a completed offense. Of course, this is the essence of attempt…we hold that the elements of the offense attempted need not be set out in an attempt indictment." *Id.*

In the present case, the indictment alleged that the appellant had the "specific intent to commit the offense of capital murder of K.W." and that she used her hand to impede K.W.'s ability to breathe, "which amounted to more than mere preparation that tended to but failed to effect the commission of the offense intended." (CR – 32). That was sufficient to allege the offense of attempted capital murder, and the State was not required to allege the constituent elements of a completed capital murder. *See Whitlow*, 609 S.W.2d at 809; *Jones*, 576 S.W.2d at 394-395; *see also Morrison v. State*, 625 S.W.2d 729, 730 (Tex. Crim. App. 1981).

The lower court of appeals did not address either *Whitlow* or *Jones* in either of its opinions but rather relied on *Crawford v. State*, 632 S.W.2d 800 (Tex. App.—Houston [14th Dist.] 1982, pet. ref'd). *Wood*, 2017 WL 3261373 at *6; *Wood*, 2017 WL 4127835, at *5. Crawford was purportedly charged with the capital murder of his victim while in the course of raping her. *Crawford*, 632 S.W.2d at 801. But the relevant statute defined capital murder as murder in the course of committing not rape but "aggravated rape." *Id.* Therefore, the *Crawford* court correctly held that the

indictment failed to allege a capital murder offense because it did not allege an "aggravated rape." *Id.*

Crawford is not applicable to the present case because Crawford was charged with a completed capital murder whereas the appellant was charged with criminal attempt. The two offenses have different elements. *Compare* TEX. PENAL CODE § 15.01(a) (West 2012) *with* TEX. PENAL CODE § 19.03(a) (West 2012). A completed offense requires an allegation of the elements of the completed offense, but criminal attempt does not require an allegation of the elements of the underlying offense. *See Whitlow*, 609 S.W.2d at 809; *Jones*, 576 S.W.2d at 394-395; *Hudson v. State*, 638 S.W.2d 45, 46–47 (Tex. App.—Houston [1st Dist.] 1982, pet. ref'd) ("Our courts have held that an indictment for criminal attempt is not fundamentally defective for failure to allege the constituent elements of the offense attempted.").

For that same reason, the lower court's reliance on *Sierra v. State*, 501 S.W.3d 179 (Tex. App.—Houston [1st Dist.] 2016, no pet.), was misplaced. Sierra was charged with a completed burglary; therefore, all of the elements of that completed burglary had to be alleged in the indictment. *Id.*, 501 S.W.3d at 182. The appellant in this case was charged with the completed offense of criminal attempt, which was itself based upon an incomplete capital murder. Therefore, the State was not required to plead all of the elements of that incomplete capital murder in the indictment. *See Whitlow*, 609 S.W.2d at 809; *Jones*, 576 S.W.2d at 394-395.

The lower court's original opinion rested heavily on Section 15.01(b) of the Penal Code to show that the elements of capital murder were also the elements of attempted capital murder. *Wood*, 2017 WL 3261373 at *2. And that reasoning was carried forward into the second opinion, albeit without mentioning Section 15.01(b) by name. *Wood*, 2017 WL 4127835, at *5. Section 15.01(b) provides that "[i]f a person attempts an offense that may be aggravated, his conduct constitutes an attempt to commit the aggravated offense if an element that aggravates the offense accompanies the attempt." TEX. PENAL CODE § 15.01(b) (West 2012).

Section 15.01(b) did not apply to this case because capital murder is not an "aggravated offense" under the Texas Penal Code. Many crimes have an aggravated variant. *See, e.g.*, TEX. PENAL CODE § 22.02 (West 2012) ("aggravated assault"); TEX. PENAL CODE § 29.03 (West 2012) ("aggravated robbery"); TEX. PENAL CODE § 22.021 (West 2012) ("aggravated sexual assault"); TEX. PENAL CODE § 20.04 (West 2012) ("aggravated kidnapping"); TEX. PENAL CODE § 37.03 (West 2012) ("perjury and aggravated perjury"); TEX. PENAL CODE § 43.04 (West 2012) ("aggravated promotion of prostitution"). In each and every case, the aggravated offense is explicitly designated so by its statutory title. And while other states may have an offense titled "aggravated murder," Texas does not. *Compare* UTAH CODE ANN. § 76-5-202 (West 2016) ("aggravated murder"); N.Y. PENAL LAW § 125.26 (McKinney 2016) ("aggravated murder") *with* TEX. PENAL CODE § 19.03 (West

2012) ("capital murder"). Nevertheless, the lower court of appeals held that capital murder was an "aggravated offense" under Section 15.01(b) because it consisted of the lesser-included offense of murder plus an aggravating circumstance. *Wood*, 2017 WL 3261373 at *2.

The lower court's original opinion would have made every offense into an "aggravated offense" if it contained any lesser-included offense. Unmoored from the statutory language, any greater offense would be an aggravated variant of the lesser-included offense in "the presence of one of the aggravating circumstances enumerated in the statute." *Wood*, 2017 WL 3261373 at *2; *Wood*, 2017 WL 4127835, at *2. Therefore, robbery would be both an aggravated theft and an aggravated assault because both theft and assault can be lesser-included offenses of robbery. *Hudson v. State*, 449 S.W.3d 495, 499 (Tex. Crim. App. 2014); *Jones v. State*, 984 S.W.2d 254, 258 (Tex. Crim. App. 1998). Robbery is theft plus the aggravating circumstance of an assault; it is also assault plus the aggravating circumstance of a theft. *Jones*, 984 S.W.2d at 256-258. Under the lower court's logic, an indictment for attempted robbery would have to allege the aggravating elements that accompanied the theft and the assault. *Wood*, 2017 WL 3261373 at *2; *Wood*, 2017 WL 4127835, at *2. But this Court has repeatedly held that there is no such pleading requirement. *See Whitlow*, 609 S.W.2d at 809; *Jones*, 576 S.W.2d at 394-395.

Moreover, the circumstances of how subsection (b) was added to Section 15.01 demonstrate that it was intended to apply to offenses that are denoted "aggravated" in the Penal Code. Subsection (b) was added to Section 15.01 in 1975 by House Bill 284. *See* Act of May 8, 1975, 64th Leg., R.S., ch. 203, § 4, 1975 Tex. Gen. Laws 476, 478. Other than the minor amendment to Section 15.01 that was required by the addition of the state jail felony to Texas law, subsection (b) was the most recent amendment of that section.

House Bill 284 made several "significant changes in the Texas rape law." House Study Group, Bill Analysis, Tex. H.B. 284, 64th Leg., R.S. (1975). The bill was meant to address the problems of "reporting and prosecution of rape" where the statutes at the time were seen to "discourage reporting and prosecution because of embarrassment to the victim and the difficulty in obtaining a conviction." House Comm. on Crim. Juris., Bill Analysis, Tex. H.B. 284, 64th Leg., R.S. (1975). Thus, the Legislature was trying to make it easier to prosecute people for rape, aggravated rape, attempted rape, and attempted aggravated rape. In this context, it can be seen that subsection (b) was specifically intended to apply to "aggravated rape," which was explicitly designated such by statute. TEX. PENAL CODE § 21.02 (Vernon 1974). It was not intended to make the prosecution of attempted capital murder more difficult, especially when capital murder was not designated as "aggravated murder" or any other type of aggravated offense.

Even if the Legislature was worried about someone being convicted of attempted aggravated rape when his conduct only showed an attempted rape, that was not an issue in the present case. As the lower court of appeals recognized, the evidence showed far more than an attempted murder—it showed an attempted capital murder. *See Wood*, 2017 WL 4127835, at *3 ("Dr. Girardet testified that the complainant was born on May 10, 2014, and that he was four months old at the time he was brought to Memorial Hermann Children's Hospital. The PSI report referred to the complainant as a 'premature infant'."). Therefore, Section 15.01(b) does not apply to a non-aggravated offense such as capital murder.

After the State's motion for rehearing, the court of appeals no longer cited Section 15.01(b); but such a deletion did not improve the strength of the court's reasoning. *Wood*, 2017 WL 4127835, at *2. Section 15.01(b) provided at least some legal basis for the court of appeals to argue that the elements of the underlying capital murder were also the elements of attempted capital murder. But without that legal basis, the court of appeals was forced to resort to bare assertions such as:

> There is no crime of capital murder that is different from murder. Capital murder is murder. But, it is murder that is accompanied by an aggravating factor that provides the State with a greater range of punishment than that which applies to the offense of murder. The requirement that the indictment allege the aggravating factor under section 19.03(a)(2) is particularly important given that the statute lists nine possible aggravating circumstances elevating the offense of murder to capital murder. The indictment in this case did not authorize a conviction for attempted capital murder, and the State is held to the offense charged in the indictment.

Wood, 2017 WL 4127835, at *5. Once again, the lower court of appeals failed to recognize the distinction between a completed offense and an attempted offense. This Court has repeatedly explained that distinction to show that criminal attempt does not require an allegation of the elements of the underlying offense. *See Whitlow*, 609 S.W.2d at 809; *Jones*, 576 S.W.2d at 394-395.

One of the elements of capital murder is a completed murder; this is so because a completed murder is the first element in the capital murder statute. TEX. PENAL CODE § 19.03(a) (West 2012) ("A person commits an offense if the person *commits murder* as defined under Section 19.02(b)(1) and…") (emphasis added). But a completed offense is nowhere listed as an element of criminal attempt. TEX. PENAL CODE § 15.01(a) (West 2012) ("A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended."). Therefore, this Court should grant review, correct the errors of the lower court of appeals, and affirm the conviction and punishment in this case.

PRAYER FOR RELIEF

It is respectfully requested that this petition should be granted and that the opinion of the court of appeals should be reversed.

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CERTIFICATE OF SERVICE AND COMPLIANCE

This is to certify that: (a) the word count function of the computer program used to prepare this document reports that there are 2,989 words in the relevant sections; and (b) a copy of the foregoing instrument will be served by efile.txcourts.gov to:

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Date: October 4, 2017

Appendix A

Wood v. State,
01-16-00179-CR, 2017 WL 3261373
(Tex. App.—Houston [1st Dist.] Aug. 1, 2017, no pet. h.)

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.
Do not publish. TEX. R. APP. P. 47.2(b).
Court of Appeals of Texas,
Houston (1st Dist.).

Cynthia Kaye WOOD, Appellant
v.
The STATE of Texas, Appellee
NO. 01–16–00179–CR
|
Opinion issued August 1, 2017

On Appeal from the 351st District Court, Harris County, Texas, Trial Court Case No. 1445251

Attorneys and Law Firms
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Theodore Lee Wood, for Cynthia Kaye Wood.

Panel consists of Chief Justice Radack and Justices Brown and Lloyd.

MEMORANDUM OPINION

Russell Lloyd, Justice
***1** Appellant, Cynthia Kaye Wood, pleaded guilty without an agreed recommendation to the first-degree felony offense of attempted capital murder. Following completion of a presentence investigation report, the trial court conducted a sentencing hearing. At the conclusion of the hearing, the trial court assessed appellant's punishment at life imprisonment.

Appellant raises five points of error. In her first and second points of error, appellant contends that the evidence was insufficient to support her guilty plea to the offense of attempted capital murder. In her third point of error, she argues that her sentence of life imprisonment is illegal. In her fourth point of error, she asserts that her trial attorney rendered ineffective assistance of counsel. In her fifth point of error, she argues that the trial court erred in proceeding with sentencing without a complete psychological evaluation. We reverse and remand for resentencing.

Background

On October 16, 2014, the State filed a complaint charging appellant with the felony offense of attempted capital murder.[1] The indictment charged as follows:

> [I]n Harris County, Texas, CYNTHIA KAYE WOOD, hereafter styled the Defendant, heretofore on or about OCTOBER 12, 2014, did then and there unlawfully, intentionally, with the specific intent to commit the offense of CAPITAL MURDER of K.W., hereafter styled the Complainant, do an act, to-wit: USE HER HAND TO IMPEDE THE COMPLAINANT'S ABILITY TO BREATHE, which amounted to more than mere preparation that tended to but failed to effect the commission of the offense intended.
>
> It is further presented that, at the time that the Defendant committed the felony offense of Attempted Capital Murder, on or about October 12, 2014, as hereinabove alleged, she used and exhibited a deadly weapon, namely, Her Hand, during the commission of said offense and during the immediate flight from said offense.

On November 23, 2015, appellant pleaded guilty to the charged offense, without an agreed recommendation, and "true" to the deadly weapon allegation. Appellant requested that the trial court assess punishment following the completion of a presentence investigation (PSI) report. The trial court admonished appellant that the range of punishment for the charged offense was five to ninety-nine years or life and up to a $10,000 fine. At the conclusion of the hearing, the trial court found that there was sufficient evidence to find appellant guilty, but did not make a finding of guilt and reset the case for January 27, 2016.

At the sentencing hearing, the trial court took judicial notice of all of the information in the clerk's file. The State introduced the PSI report into evidence and called Dr. Rebecca Girardet to testify. Dr. Girardet testified that the complainant was born on May 10, 2014, and that he was four months old at the time he was brought to Memorial Hermann Children's Hospital.

***2** At the conclusion of the evidence, the trial court found appellant guilty of attempted capital murder and assessed her punishment at life in prison. This appeal followed.

Sufficiency of the Evidence

In her first point of error, appellant contends that the evidence was insufficient to support her guilty plea to the offense of attempted capital murder because a necessary element of the charged offense was not both introduced into the record and accepted by the trial court, in contravention of Article 1.15 of the Code of Criminal Procedure. In her second point of error, she argues that the

evidence was insufficient to support her guilty plea because the evidence adduced at the sentencing hearing, which included the PSI report, should not have been used to substantiate her guilty plea.

A. Elements of Attempted Capital Murder

A person commits murder if the person "intentionally or knowingly causes the death of an individual[.]" TEX. PENAL CODE ANN. § 19.02(b)(1) (West 2011). A person commits capital murder if "the person commits murder as defined under section 19.02(b)(1)" and an aggravating circumstance exists. *Id.* § 19.03(a). An essential element of capital murder is the presence of one of the aggravating circumstances enumerated in the statute. *See id.* Section 19.03(a) enumerates nine possible aggravating circumstances which elevate murder to capital murder, one of which is the murder of "an individual under 10 years of age." *Id.* § 19.03(a)(8).

Under Penal Code section 15.01(a), "[a] person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended." *Id.* § 15.01(a) (West 2011). Subsection (b) provides that "[i]f a person attempts an offense that may be aggravated, his conduct constitutes an attempt to commit the aggravated offense if an element that aggravates the offense accompanies the attempt." *Id.* (b). Attempted capital murder is a first-degree felony which carries a punishment range of imprisonment for life or for any term of no more than ninety-nine years or less than five years. *See* TEX. PENAL CODE §§ 12.32(a), 15.01(d), 19.03(b) (West 2011).

B. Code of Criminal Procedure Article 1.15

Article 1.15 states:

> No person can be convicted of a felony except upon the verdict of a jury duly rendered and recorded, unless the defendant, upon entering a plea, has in open court in person waived his right of trial by jury in writing in accordance with Articles 1.13 and 1.14; provided, however, that it shall be necessary for the state to introduce evidence into the record showing the guilt of the defendant and said evidence shall be accepted by the court as the basis for its judgment and in no event shall a person charged be convicted upon his plea without sufficient evidence to support the same. The evidence may be stipulated if the defendant in such case consents in writing, in open court, to waive the appearance, confrontation, and cross-examination of witnesses, and further consents either to an oral stipulation of the evidence and testimony or to the introduction of testimony by affidavits, written statements of witnesses, and any other documentary evidence in support of the judgment of the court. Such waiver and consent must be approved by the court in writing, and be filed in the file of the papers of the cause.

***3** TEX. CODE CRIM. PROC. ANN. art. 1.15 (West 2005).

The evidence offered to support a guilty plea can take several forms. *See Menefee v. State*, 287 S.W.3d 9, 13 (Tex. Crim. App. 2009). Evidence can be proffered in testimonial or documentary form, in the form of an oral or written stipulation, or in the form of a judicial confession. *See id.* So long as a judicial confession covers all of the elements of the charged offense, it will suffice to support the guilty plea. *See id.*

C. Analysis

On November 23, 2015, appellant signed a document entitled Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession, which stated, in relevant part:

> In open court and prior to entering my plea, I waive the right of trial by jury. I also waive the appearance, confrontation, and cross-examination of witnesses, and my right against self-incrimination. The charges against me allege that in Harris County, Texas, **CYNTHIA KAYE WOOD,** hereafter styled the defendant, heretofore on or about **OCTOBER 12, 2014**, did then and there unlawfully, intentionally, with the specific intent to commit the offense of CAPITAL MURDER of K.W., hereafter styled the Complainant, do an act, to-wit: USE HER HAND TO IMPEDE THE COMPLAINANT'S ABILITY TO BREATHE, which amounted to more than mere preparation that tended to but failed to effect the

commission of the offense intended.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

> It is further alleged that during the commission of the felony offense of attempted capital murder, the Defendant, used and exhibited a deadly weapon, namely, her hands, on or about October 12, 2014.
>
> I understand the above allegations and I confess that they are true and that the acts alleged above were committed on October 12, 2014.
>
> In open court I consent to the oral and written stipulation of evidence in this case and to the introduction of affidavits, written statements, of witnesses, and other documentary evidence.

Appellant argues that her judicial confession does not constitute sufficient evidence to support her plea of guilty to the charge of attempted capital murder because her confession did not establish every element of the offense of attempted capital murder. Specifically, she asserts that although the document describes a murder, it makes no reference to an aggravating factor (here, the complainant's age).

When a stipulation or confession is deficient and does not establish every element of the offense charged, the lack of evidence "may be compensated for by other competent evidence in the record." *Menefee*, 287 S.W.3d at 14. This includes evidence presented during a sentencing hearing. *Stewart v. State*, 12 S.W.3d 146, 147–49 (Tex. App.–Houston [1st Dist.] 2000, no pet.) (stating that "article 1.15 does not distinguish between evidence offered at the guilt/innocence phase and the punishment phase of the trial" and "simply requires that there be evidence in 'the record showing the guilt of the defendant.' ") (quoting TEX. CODE CRIM. PROC. ANN. art. 1.15)); *Menefee III v. State*, No. 12–07–00001–CR, 2010 WL 3247816, at *1, *6–7 (Tex. App.–Tyler Aug. 18, 2010, pet. ref'd) (mem. op., not designated for publication) (on remand, finding evidence at sentencing hearing sufficient to support guilty plea).

***4** To satisfy the sufficiency requirements of Article 1.15, the State was required to offer supporting evidence that embraced every element of the charged offense. *See Menefee*, 287 S.W.3d at 13. The State presented evidence during the sentencing hearing, including Dr. Girardet's testimony and the PSI report, which was sufficient to support the charged offense. *See id.* at 18–19; *Stewart*, 12 S.W.3d at 147–49. Dr. Girardet testified that the complainant was born on May 10, 2014, and that he was four months old at the time he was brought to Memorial Hermann Children's Hospital. The PSI report referred to the complainant as a "premature infant."

Appellant concedes that this evidence was sufficient to support her plea of guilty to attempted capital murder but contends that the evidence cannot be used to support her guilty plea because the record does not reflect that the trial court accepted the evidence adduced at the sentencing hearing as the basis for its judgment of conviction as required by Article 1.15. Rather, appellant argues, the trial court explicitly decided that appellant's guilty plea was supported on the basis of evidence produced at the November 23, 2015 guilty plea hearing. In support of her argument, appellant relies on the following statement by the trial court: "[B]ased on your plea and on the papers that you filed today, I'm going to find there is sufficient evidence to find you guilty, but I'm going to make no further finding today."

We recently rejected a similar argument in *Doyle v. State*, No. 01–16–00522–CR, 2017 WL 711747 (Tex. App.–Houston [1st Dist.] Feb. 23, 2017, no pet.) (mem. op., not designated for publication). There, the defendant argued that there was no indication in the record that the trial court "accepted" the evidence at the sentencing hearing "as the basis for its judgment" of conviction. *See id.* at *3. He argued that the record, instead, indicated that the trial court determined guilt based only on what transpired when he entered his guilty plea three months earlier without regard to evidence received later.

Disagreeing with the defendant's construction of Article 1.15, we noted:

> The plain meaning of the text of Article 1.15 does not support appellant's argument. Article 1.15 does not impose a duty on the trial court to designate which body of evidence supported, and by implication which did not support, its judgment. Instead, it requires the trial court to accept the evidence of guilt the State offered, without differentiation: "[I]t shall be necessary for the state to introduce evidence into the record showing the guilt of the defendant and said evidence shall be accepted by the court as the basis for its judgment." TEX. CODE CRIM. PROC. art. 1.15; *cf. Stewart*, 12 S.W.3d at 148 ("Article 1.15 simply requires that there be evidence in 'the record showing the guilt of the defendant.' ").

Doyle, 2017 WL 711747, at *4.

The court concluded that the record did not support the defendant's argument, either. *See id.* It noted that the trial court did not limit the evidence of guilt to that received before the sentencing hearing. *Id.* Rather, following the defendant's guilty plea, the trial court expressly stated that it would "withhold any findings" to await the PSI report that was admitted as evidence at the sentencing hearing. *Id.* Only after that evidence was admitted, did the trial court find the defendant guilty. *Id.*

Similarly, the trial court here did not limit the evidence of

guilt to that received before the sentencing hearing. The trial court deferred a finding of guilty at the plea hearing, and only after testimony was presented and the PSI report was admitted at the sentencing hearing did it find appellant guilty and enter judgment.

***5** Because there was sufficient evidence to support appellant's conviction for attempted capital murder, we overrule appellant's first and second points of error.

Legality of Sentence

In her third point of error, appellant contends that the evidence was sufficient only to support a second-degree felony conviction, which carries a punishment of two to twenty years' confinement, and therefore, her life sentence is illegal. In her supplemental reply brief, she further argues that her life sentence is illegal because the indictment in this case only authorized a second-degree felony conviction.

We note that issues generally may not be raised for the first time in a reply brief. *See* TEX. R. APP. P. 38.3; *Morales v. State*, 371 S.W.3d 576, 589 (Tex. App.–Houston [14th Dist.] 2012, pet. ref'd); *Barrios v. State*, 27 S.W.3d 313, 322 (Tex. App.–Houston [1st Dist.] 2000, pet. ref'd). However, "[a] trial or appellate court which otherwise has jurisdiction over a criminal conviction may always notice and correct an illegal sentence." *Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003) ("There has never been anything in Texas law that prevented *any* court with jurisdiction over a criminal case from noticing and correcting an illegal sentence.") (emphasis in original); *Sierra v. State*, 501 S.W.3d 179, 183 (Tex. App.–Houston [1st Dist.] 2016, no pet.); *Baker v. State*, 278 S.W.3d 923, 927 (Tex. App.–Houston [14th Dist.] 2009, pet. ref'd). We therefore address appellant's argument that her life sentence is illegal because the indictment only authorized a second-degree felony conviction.

Here, the indictment charged appellant with

> unlawfully, intentionally, with the specific intent to commit the offense of CAPITAL MURDER of K.W., hereafter styled the Complainant, do an act, to-wit: USE HER HAND TO IMPEDE THE COMPLAINANT'S ABILITY TO BREATHE, which amounted to more than mere preparation that tended to but failed to effect the commission of the offense intended.

The indictment tracked the language of Penal Code sections 19.02(b)(1) (murder) and 15.01(a) (criminal attempt), but it did not allege any of the aggravating circumstances that elevate the offense of murder to capital murder. *See* TEX. PENAL CODE § 19.03(a).

The Texas Constitution guarantees defendants the right to indictment by a grand jury for all felony offenses. TEX. CONST. art. I, § 10; *Riney v. State*, 28 S.W.3d 561, 564 (Tex. Crim. App. 2000). The indictment serves a dual purpose of protecting citizens against arbitrary accusations by the government and providing a defendant notice of the charged offense so he may prepare an effective defense. *Riney*, 28 S.W.3d at 565. The accused is not required to look elsewhere than the indictment for notice, and "it is not sufficient to say that the accused knew with what offense he was charged." *Id.*

In *Sierra*, we held that "[w]hen 'an indictment facially charges a complete offense, it is reasonable to presume the State intended to charge the offense alleged, and none other.' " 501 S.W.3d at 182–83 (quoting *Thomason v. State*, 892 S.W.2d 8, 11 (Tex. Crim. App. 1994)). "Therefore, when the indictment charges a complete offense, 'the State is held to the offense charged in the indictment, regardless of whether the State intended to charge that offense.' " *Sierra*, 501 S.W.3d at 182–83 (quoting *Thomason*, 892 S.W.2d at 11); *see also Rodriguez v. State*, 18 S.W.3d 228, 232 (Tex. Crim. App. 2000) (concluding conviction not authorized on theory not alleged in charging instrument). To hold otherwise would circumvent the requirement that an indictment give adequate notice to the defendant. *See Riney*, 28 S.W.3d at 565.

***6** Here, the indictment charged a complete offense—attempted murder. Although the State intended to charge appellant with the offense of attempted capital murder, it did not do so because an element of that offense—the aggravating factor—was missing from the indictment. *See Crawford v. State*, 632 S.W.2d 800, 801 (Tex. App.–Houston [14th Dist.] 1982, pet. ref'd) (reversing defendant's conviction for capital murder where indictment did not allege "aggravated rape" as enhancing offense under Penal Code section 19.03(a)(2) elevating murder to capital murder). The requirement that the indictment allege the aggravating factor under section 19.03(a)(2) is particularly important given that the statute lists nine possible aggravating circumstances elevating the offense of murder to capital murder. The indictment in this case did not authorize a conviction for attempted capital murder, and the State is held to the offense charged in the indictment. *See Sierra*, 501 S.W.3d at 183.

The crime charged in the indictment was attempted murder which is a second-degree felony offense with a maximum sentence of confinement of twenty years. *See* TEX. PENAL CODE ANN. §§ 19.02(c), 15.01(d), 12.33(a) (West 2011). "A sentence that is outside the maximum or minimum range of punishment is unauthorized by law and

therefore illegal." *Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003). Consequently, the trial court's sentence of life imprisonment in this case was "illegal, unauthorized, and void." *Sierra*, 501 S.W.3d at 185 (holding that trial court's sentence of thirty years' imprisonment was illegal, unauthorized, and void where crime charged in indictment was second-degree felony which carried maximum sentence of twenty years' imprisonment); *see also Mizell*, 119 S.W.3d at 806; *Ex parte Rich*, 194 S.W.3d 508, 512 (Tex. Crim. App. 2006) (concluding that mischaracterization of offense in indictment resulted in sentence in violation of law). The remedy for a non-negotiated guilty plea that leads to an illegal sentence is remand for proper assessment of punishment. *See Rich*, 194 S.W.3d at 514–15. Accordingly, we sustain appellant's third point of error.[2]

Conclusion

We reverse appellant's conviction for attempted capital murder, order the trial court to adjudge appellant guilty of attempted murder, and remand the case for assessment of punishment.

All Citations

Not Reported in S.W.3d, 2017 WL 3261373

Footnotes

1 A hospital's security camera showed appellant attempting to suffocate the complainant, her four-month old son, by placing her hand over the complainant's nose and/or mouth on two separate occasions.

2 In light of our disposition, we do not reach appellant's fourth point of error arguing that trial counsel rendered ineffective assistance of counsel, or her fifth point of error asserting that the trial court erred in proceeding with sentencing without a complete psychological evaluation.

Appendix B

Wood v. State,
01-16-00179-CR, 2017 WL 4127835
(Tex. App.—Houston [1st Dist.] Sept. 19, 2017, pet. filed)

2017 WL 4127835
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.
Do not publish. TEX. R. APP. P. 47.2(b).
Court of Appeals of Texas,
Houston (1st Dist.).

Cynthia Kaye WOOD, Appellant
v.
The STATE of Texas, Appellee
NO. 01–16–00179–CR
|
Opinion issued September 19, 2017

On Appeal from the 351st District Court, Harris County, Texas, Trial Court Case No. 1445251

Attorneys and Law Firms
Honorable Kim K. Ogg, Daniel C. McCrory, for The State of Texas.

Theodore Lee Wood, for Cynthia Kaye Wood.

Panel consists of Chief Justice Radack and Justices Brown and Lloyd.

MEMORANDUM OPINION ON REHEARING[1]

Russell Lloyd, Justice
***1** Appellant, Cynthia Kaye Wood, pleaded guilty without an agreed recommendation to the first-degree felony offense of attempted capital murder. Following completion of a presentence investigation report, the trial court conducted a sentencing hearing. At the conclusion of the hearing, the trial court assessed appellant's punishment at life imprisonment.

Appellant raises five points of error. In her first and second points of error, appellant contends that the evidence was insufficient to support her guilty plea to the offense of attempted capital murder. In her third point of error, she argues that her sentence of life imprisonment is illegal. In her fourth point of error, she asserts that her trial attorney rendered ineffective assistance of counsel. In her fifth point of error, she argues that the trial court erred in proceeding with sentencing without a complete psychological evaluation. We reverse and remand for resentencing.

Background

On October 16, 2014, the State filed a complaint charging appellant with the felony offense of attempted capital murder.[2] The indictment charged as follows:

> [I]n Harris County, Texas, CYNTHIA KAYE WOOD, hereafter styled the Defendant, heretofore on or about OCTOBER 12, 2014, did then and there unlawfully, intentionally, with the specific intent to commit the offense of CAPITAL MURDER of K.W., hereafter styled the Complainant, do an act, to-wit: USE HER HAND TO IMPEDE THE COMPLAINANT'S ABILITY TO BREATHE, which amounted to more than mere preparation that tended to but failed to effect the commission of the offense intended.
>
> It is further presented that, at the time that the Defendant committed the felony offense of Attempted Capital Murder, on or about October 12, 2014, as hereinabove alleged, she used and exhibited a deadly weapon, namely, Her Hand, during the commission of said offense and during the immediate flight from said offense.

On November 23, 2015, appellant pleaded guilty to the charged offense, without an agreed recommendation, and "true" to the deadly weapon allegation. Appellant requested that the trial court assess punishment following the completion of a presentence investigation (PSI) report. The trial court admonished appellant that the range of punishment for the charged offense was five to ninety-nine years or life and up to a $10,000 fine. At the conclusion of the hearing, the trial court found that there was sufficient evidence to find appellant guilty, but did not make a finding of guilt and reset the case for January 27, 2016.

At the sentencing hearing, the trial court took judicial notice of all of the information in the clerk's file. The State introduced the PSI report into evidence and called Dr. Rebecca Girardet to testify. Dr. Girardet testified that the complainant was born on May 10, 2014, and that he was four months old at the time he was brought to Memorial Hermann Children's Hospital.

***2** At the conclusion of the evidence, the trial court found appellant guilty of attempted capital murder and assessed her punishment at life in prison. This appeal followed.

Sufficiency of the Evidence

In her first point of error, appellant contends that the evidence was insufficient to support her guilty plea to the offense of attempted capital murder because a necessary element of the charged offense was not both introduced into the record and accepted by the trial court, in contravention of Article 1.15 of the Code of Criminal Procedure. In her second point of error, she argues that the

evidence was insufficient to support her guilty plea because the evidence adduced at the sentencing hearing, which included the PSI report, should not have been used to substantiate her guilty plea.

A. Elements of Attempted Capital Murder

A person commits murder if the person "intentionally or knowingly causes the death of an individual[.]" TEX. PENAL CODE ANN. § 19.02(b)(1) (West 2011). A person commits capital murder if "the person commits murder as defined under section 19.02(b)(1)" and an aggravating circumstance exists. *Id.* § 19.03(a). An essential element of capital murder is the presence of one of the aggravating circumstances enumerated in the statute. *See id.* Section 19.03(a) enumerates nine possible aggravating circumstances which elevate murder to capital murder, one of which is the murder of "an individual under 10 years of age." *Id.* § 19.03(a)(8).

Under Penal Code section 15.01(a), "[a] person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended." *Id.* § 15.01(a) (West 2011). Attempted capital murder is a first-degree felony which carries a punishment range of imprisonment for life or for any term of no more than ninety-nine years or less than five years. *See* TEX. PENAL CODE §§ 12.32(a), 15.01(d), 19.03(b) (West 2011).

B. Code of Criminal Procedure Article 1.15

Article 1.15 states:

> No person can be convicted of a felony except upon the verdict of a jury duly rendered and recorded, unless the defendant, upon entering a plea, has in open court in person waived his right of trial by jury in writing in accordance with Articles 1.13 and 1.14; provided, however, that it shall be necessary for the state to introduce evidence into the record showing the guilt of the defendant and said evidence shall be accepted by the court as the basis for its judgment and in no event shall a person charged be convicted upon his plea without sufficient evidence to support the same. The evidence may be stipulated if the defendant in such case consents in writing, in open court, to waive the appearance, confrontation, and cross-examination of witnesses, and further consents either to an oral stipulation of the evidence and testimony or to the introduction of testimony by affidavits, written statements of witnesses, and any other documentary evidence in support of the judgment of the court. Such waiver and consent must be approved by the court in writing, and be filed in the file of the papers of the cause.

TEX. CODE CRIM. PROC. ANN. art. 1.15 (West 2005).

***3** The evidence offered to support a guilty plea can take several forms. *See Menefee v. State*, 287 S.W.3d 9, 13 (Tex. Crim. App. 2009). Evidence can be proffered in testimonial or documentary form, in the form of an oral or written stipulation, or in the form of a judicial confession. *See id.* So long as a judicial confession covers all of the elements of the charged offense, it will suffice to support the guilty plea. *See id.*

C. Analysis

On November 23, 2015, appellant signed a document entitled Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession, which stated, in relevant part:

> In open court and prior to entering my plea, I waive the right of trial by jury. I also waive the appearance, confrontation, and cross-examination of witnesses, and my right against self-incrimination. The charges against me allege that in Harris County, Texas, **CYNTHIA KAYE WOOD,** hereafter styled the defendant, heretofore on or about **OCTOBER 12, 2014**, did then and there unlawfully, intentionally, with the specific intent to commit the offense of CAPITAL MURDER of K.W., hereafter styled the Complainant, do an act, to-wit: USE HER HAND TO IMPEDE THE COMPLAINANT'S ABILITY TO BREATHE, which amounted to more than mere preparation that tended to but failed to effect the commission of the offense intended.
>
> **AGAINST THE PEACE AND DIGNITY OF THE STATE.**

> It is further alleged that during the commission of the felony offense of attempted capital murder, the Defendant, used and exhibited a deadly weapon, namely, her hands, on or about October 12, 2014.
>
> I understand the above allegations and I confess that they are true and that the acts alleged above were committed on October 12, 2014.
>
> In open court I consent to the oral and written stipulation of evidence in this case and to the introduction of affidavits, written statements, of witnesses, and other documentary evidence.

Appellant argues that her judicial confession does not constitute sufficient evidence to support her plea of guilty to the charge of attempted capital murder because her confession did not establish every element of the offense of attempted capital murder. Specifically, she asserts that although the document describes a murder, it makes no reference to an aggravating factor (here, the complainant's age).

When a stipulation or confession is deficient and does not establish every element of the offense charged, the lack of evidence "may be compensated for by other competent evidence in the record." *Menefee*, 287 S.W.3d at 14. This includes evidence presented during a sentencing hearing. *Stewart v. State*, 12 S.W.3d 146, 147–49 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (stating that "article 1.15 does not distinguish between evidence offered at the guilt/innocence phase and the punishment phase of the trial" and "simply requires that there be evidence in 'the record showing the guilt of the defendant.' ") (quoting TEX. CODE CRIM. PROC. ANN. art. 1.15)); *Menefee III v. State*, No. 12–07–00001–CR, 2010 WL 3247816, at *1, *6–7 (Tex. App.—Tyler Aug. 18, 2010, pet. ref'd) (mem. op., not designated for publication) (on remand, finding evidence at sentencing hearing sufficient to support guilty plea).

To satisfy the sufficiency requirements of Article 1.15, the State was required to offer supporting evidence that embraced every element of the charged offense. *See Menefee*, 287 S.W.3d at 13. The State presented evidence during the sentencing hearing, including Dr. Girardet's testimony and the PSI report, which was sufficient to support the charged offense. *See id.* at 18–19; *Stewart*, 12 S.W.3d at 147–49. Dr. Girardet testified that the complainant was born on May 10, 2014, and that he was four months old at the time he was brought to Memorial Hermann Children's Hospital. The PSI report referred to the complainant as a "premature infant."

***4** Appellant concedes that this evidence was sufficient to support her plea of guilty to attempted capital murder but contends that the evidence cannot be used to support her guilty plea because the record does not reflect that the trial court accepted the evidence adduced at the sentencing hearing as the basis for its judgment of conviction as required by Article 1.15. Rather, appellant argues, the trial court explicitly decided that appellant's guilty plea was supported on the basis of evidence produced at the November 23, 2015 guilty plea hearing. In support of her argument, appellant relies on the following statement by the trial court: "[B]ased on your plea and on the papers that you filed today, I'm going to find there is sufficient evidence to find you guilty, but I'm going to make no further finding today."

We recently rejected a similar argument in *Doyle v. State*, No. 01–16–00522–CR, 2017 WL 711747 (Tex. App.—Houston [1st Dist.] Feb. 23, 2017, no pet.) (mem. op., not designated for publication). There, the defendant argued that there was no indication in the record that the trial court "accepted" the evidence at the sentencing hearing "as the basis for its judgment" of conviction. *See id.* at *3. He argued that the record, instead, indicated that the trial court determined guilt based only on what transpired when he entered his guilty plea three months earlier without regard to evidence received later.

Disagreeing with the defendant's construction of Article 1.15, we noted:

> The plain meaning of the text of Article 1.15 does not support appellant's argument. Article 1.15 does not impose a duty on the trial court to designate which body of evidence supported, and by implication which did not support, its judgment. Instead, it requires the trial court to accept the evidence of guilt the State offered, without differentiation: "[I]t shall be necessary for the state to introduce evidence into the record showing the guilt of the defendant and said evidence shall be accepted by the court as the basis for its judgment." TEX. CODE CRIM. PROC. art. 1.15; *cf. Stewart*, 12 S.W.3d at 148 ("Article 1.15 simply requires that there be evidence in 'the record showing the guilt of the defendant.' ").

Doyle, 2017 WL 711747, at *4.

The court concluded that the record did not support the defendant's argument, either. *See id.* It noted that the trial court did not limit the evidence of guilt to that received before the sentencing hearing. *Id.* Rather, following the defendant's guilty plea, the trial court expressly stated that it would "withhold any findings" to await the PSI report that was admitted as evidence at the sentencing hearing. *Id.* Only after that evidence was admitted, did the trial court find the defendant guilty. *Id.*

Similarly, the trial court here did not limit the evidence of guilt to that received before the sentencing hearing. The trial court deferred a finding of guilty at the plea hearing, and only after testimony was presented and the PSI report was admitted at the sentencing hearing did it find appellant

guilty and enter judgment.

Because there was sufficient evidence to support appellant's conviction for attempted capital murder, we overrule appellant's first and second points of error.

Legality of Sentence

In her third point of error, appellant contends that the evidence was sufficient only to support a second-degree felony conviction, which carries a punishment of two to twenty years' confinement, and therefore, her life sentence is illegal. In her supplemental reply brief, she further argues that her life sentence is illegal because the indictment in this case only authorized a second-degree felony conviction.

We note that issues generally may not be raised for the first time in a reply brief. *See* TEX. R. APP. P. 38.3; *Morales v. State*, 371 S.W.3d 576, 589 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd); *Barrios v. State*, 27 S.W.3d 313, 322 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd). However, "[a] trial or appellate court which otherwise has jurisdiction over a criminal conviction may always notice and correct an illegal sentence." *Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003) ("There has never been anything in Texas law that prevented *any* court with jurisdiction over a criminal case from noticing and correcting an illegal sentence.") (emphasis in original); *Sierra v. State*, 501 S.W.3d 179, 183 (Tex. App.—Houston [1st Dist.] 2016, no pet.); *Baker v. State*, 278 S.W.3d 923, 927 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). We therefore address appellant's argument that her life sentence is illegal because the indictment only authorized a second-degree felony conviction.

***5** Here, the indictment charged appellant with

> unlawfully, intentionally, with the specific intent to commit the offense of CAPITAL MURDER of K.W., hereafter styled the Complainant, do an act, to-wit: USE HER HAND TO IMPEDE THE COMPLAINANT'S ABILITY TO BREATHE, which amounted to more than mere preparation that tended to but failed to effect the commission of the offense intended.

The indictment tracked the language of Penal Code sections 19.02(b)(1) (murder) and 15.01(a) (criminal attempt), but it did not allege any of the aggravating circumstances that elevate the offense of murder to capital murder. *See* TEX. PENAL CODE § 19.03(a).

The Texas Constitution guarantees defendants the right to indictment by a grand jury for all felony offenses. TEX. CONST. art. I, § 10; *Riney v. State*, 28 S.W.3d 561, 564 (Tex. Crim. App. 2000). The indictment serves a dual purpose of protecting citizens against arbitrary accusations by the government and providing a defendant notice of the charged offense so he may prepare an effective defense. *Riney*, 28 S.W.3d at 565. The accused is not required to look elsewhere than the indictment for notice, and "it is not sufficient to say that the accused knew with what offense he was charged." *Id.*

In *Sierra*, we held that "[w]hen 'an indictment facially charges a complete offense, it is reasonable to presume the State intended to charge the offense alleged, and none other.' " 501 S.W.3d at 182–83 (quoting *Thomason v. State*, 892 S.W.2d 8, 11 (Tex. Crim. App. 1994)). "Therefore, when the indictment charges a complete offense, 'the State is held to the offense charged in the indictment, regardless of whether the State intended to charge that offense.' " *Sierra*, 501 S.W.3d at 182–83 (quoting *Thomason*, 892 S.W.2d at 11); *see also Rodriguez v. State*, 18 S.W.3d 228, 232 (Tex. Crim. App. 2000) (concluding conviction not authorized on theory not alleged in charging instrument). To hold otherwise would circumvent the requirement that an indictment give adequate notice to the defendant. *See Riney*, 28 S.W.3d at 565.

Here, the indictment charged a complete offense—attempted murder. Although the State intended to charge appellant with the offense of attempted capital murder, it did not do so because the aggravating factor was missing from the indictment. *See Crawford v. State*, 632 S.W.2d 800, 801 (Tex. App.—Houston [14th Dist.] 1982, pet. ref'd) (reversing defendant's conviction for capital murder where indictment did not allege "aggravated rape" as enhancing offense under Penal Code section 19.03(a)(2) elevating murder to capital murder). The term "capital murder" is a term that describes a sentencing regime rather than a criminal offense. There is no crime of capital murder that is different from murder. Capital murder is murder. But, it is murder that is accompanied by an aggravating factor that provides the State with a greater range of punishment than that which applies to the offense of murder. The requirement that the indictment allege the aggravating factor under section 19.03(a)(2) is particularly important given that the statute lists nine possible aggravating circumstances elevating the offense of murder to capital murder. The indictment in this case did not authorize a conviction for attempted capital murder, and the State is held to the offense charged in the indictment. *See Sierra*, 501 S.W.3d at 183.

***6** The crime charged in the indictment was attempted murder which is a second-degree felony offense with a maximum sentence of confinement of twenty years. *See* TEX. PENAL CODE ANN. §§ 19.02(c),

12.33(a) (West 2011). "A sentence that is outside the maximum or minimum range of punishment is unauthorized by law and therefore illegal." *Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003). Consequently, the trial court's sentence of life imprisonment in this case was "illegal, unauthorized, and void." *Sierra*, 501 S.W.3d at 185 (holding that trial court's sentence of thirty years' imprisonment was illegal, unauthorized, and void where crime charged in indictment was second-degree felony which carried maximum sentence of twenty years' imprisonment); *see also Mizell*, 119 S.W.3d at 806; *Ex parte Rich*, 194 S.W.3d 508, 512 (Tex. Crim. App. 2006) (concluding that mischaracterization of offense in indictment resulted in sentence in violation of law). The remedy for a non-negotiated guilty plea that leads to an illegal sentence is remand for proper assessment of punishment. *See Rich*, 194 S.W.3d at 514–15. Accordingly, we sustain appellant's third point of error.[3]

Conclusion

We reverse appellant's conviction for attempted capital murder, order the trial court to adjudge appellant guilty of attempted murder, and remand the case for assessment of punishment.

All Citations

Not Reported in S.W.3d, 2017 WL 4127835

Footnotes

1 We originally issued an opinion in this case on August 1, 2017. The State filed a motion for rehearing. We deny the motion for rehearing, withdraw our August 1, 2017 opinion and judgment, and issue this opinion and judgment in their stead. Our disposition and judgment remain unchanged.

2 A hospital's security camera showed appellant attempting to suffocate the complainant, her four-month old son, by placing her hand over the complainant's nose and/or mouth on two separate occasions.

3 In light of our disposition, we do not reach appellant's fourth point of error arguing that trial counsel rendered ineffective assistance of counsel, or her fifth point of error asserting that the trial court erred in proceeding with sentencing without a complete psychological evaluation.

